United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ affidavit of mailing

75-6073

To be argued by
MICHAEL G. CAVANAGH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6073

B
P/S

ANTHONY RUSIELEWICZ,
Appellant,

—against—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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United States Court of Appeals

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Docket No. 75-6073

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BRIEF FOR THE APPELLEE

Preliminary Statement

This is an action commenced in the district court by plaintiff-appellant, Anthony Rusielewicz, pursuant to section 205(g) of the Social Security Act, as amended, (hereinafter referred to as the Act), 42 U.S.C. § 405(g) to review a final determination of the Secretary of Health, Education, and Welfare, which denied plaintiff's application for a period of disability and disability insurance benefits. The district court in its opinion dated June 16, 1975 granted the secretary's motion for a judgment on the pleadings, after having found that there was substantial evidence to support the administrative determination denying disability benefits to plaintiff.

Plaintiff filed an application for a period of disability and for disability insurance benefits on August 8, 1972 (Tr. 70-73), alleging that he became unable to work in October 1971, at age 20. The application was denied

initially (Tr. 76-77) and on reconsideration by the Bureau of Disability Insurance of the Social Security Administration (Tr. 81-82). The administrative law judge, before whom plaintiff, his attorney, and a vocational expert appeared, considered the case *de novo*, and on May 17, 1974, found that plaintiff was not under a disability (Tr. 14-21). The administrative law judge's decision became the final decision of the Secretary of Health, Education, and Welfare, when the Appeals Council approved that decision on August 14, 1974 (Tr. 6).

On this appeal appellant contends that the secretary's decision is not supported by substantial evidence and that the administrative determination is improper because of shortcomings on the part of the administrative law judge in the way he conducted the hearing and developed the evidence. The government's position is that there is substantial evidence in support of the secretary's decision and that the administrative law judge conducted a full and fair hearing.

Statement of the Case

Plaintiff, a 25 year old male with a seventh grade education, has alleged disability as of October 14, 1971 due to the amputation of his left leg below the knee in 1965, and a Colles fracture[1] in 1972 (Tr. 70-73). Between March of 1969 and October of 1971, plaintiff had his only employment, working as an operator of a xerox machine (Tr. 50). He worked at a place within a block of his house, to which he claimed he only went when driven by a friend, despite the fact plaintiff admitted at various times being capable of walking two to four blocks (Tr. 51, 56-58, 108). This employment was

[1] The most common type of wrist fracture, Roscoe M. Grey, *Attorney's Textbook of Medicine* ¶ 3.20 (1975).

enough to enable plaintiff to become insured under the Act, which insured status continued until June 30, 1973.

In 1962 plaintiff's leg was run over by a truck. He was hospitalized on several occasions after the accident for treatment of the injury. Plaintiff developed osteomyelitis [2] in his left leg, which ultimately resulted in the amputation of his leg below the knee in 1965 (Tr. 49, 108). Seven or eight months after the amputation plaintiff was fitted with a prosthesis which has enabled him to get around reasonably well. (Tr. 108-109).

On October 23, 1971, about the time of the alleged onset of plaintiff's period of disability, he was admitted to the hospital in Glens Falls, New York, after almost drowning as a result of a boating accident on a lake at a nearby vacation resort. He was diagnosed as suffering from pneumonia, which was evidently caused by water entering his lungs during the boating accident (Tr. 102-105). He was discharged the next day and treated for this condition by Dr. J. I. Weissler in Brooklyn, apparently his regular physician (Tr. 106).

In February, 1972, plaintiff broke his left wrist for which Dr. Weissler also treated him (Tr. 106). Dr. Weissler's report, dated September 20, 1972 does not indicate plaintiff's wrist healed improperly. On December 15, 1972 plaintiff was examined by an orthopedic surgeon, Dr. Hershel Samuels, whose report indicated that plaintiff's wrist had healed satisfactorily. Despite the fact that plaintiff complained to the doctor that he had pain in the wrist occasionally, the doctor found that plaintiff had full use of his wrist and no tenderness resulting from this fracture that had occurred ten months earlier. (Tr. 108-109).

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[2] Infection of the bone and marrow usually caused by staphylococcus or streptococcus, J. E. Schmidt, *Attorney's Dictionary of Medicine* ¶ 602 (1971).

At the same time that Dr. Samuels examined plaintiff's wrist he also examined plaintiff's left stump. Plaintiff informed the doctor that he had very little difficulty with his leg but that he suffered from occasional pain in his leg, rather regular phantom pain, and that he had occasional breakdowns of the tissue and drainage from his leg at the site of the amputation. At the time of the amputation in 1965, plaintiff had been instructed that if he had problems with his leg he was to report immediately to Kings County Clinic. But plaintiff admitted he had been to the clinic only once (Tr. 57, 58). As of September 20, 1972, plaintiff was not treated for any leg problems by his treating physician, Dr. Weissler (Tr. 106).

Dr. Samuels, the orthopedic surgeon, found that plaintiff had moderate osteoporosis[3] of the knee,[4] but found no evidence of tissue breakdown. The doctor concluded that plaintiff had a fairly good gait, could sit for unlimited periods of time and walk four or five blocks. In the doctor's opinion, plaintiff could not walk without his cane or use public transportation. (Tr. 108-109).

At plaintiff's hearing before the administrative law judge, Mr. Daniel Weider, a vocational expert, testified. In response to a hypothetical question posed by the administrative law judge, in which Mr. Weider was asked to consider plaintiff's age, education, work experience and medical condition as described by Dr. Samuels' report, Mr. Weider stated that plaintiff could work. He made reference to a number of light sedentary jobs, widely

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[3] Abnormal diminution of bone density and weight, but not volume, *Dorland's Illustrated Medical Dictionary* 1071, 1284 (24th ed. 1965).

[4] Osteoporatic bones and generally neither painful nor tender. Cecil *A Textbook on Medicine*, subchapter on Osteoporosis 1389.

available in the New York area, for which plaintiff was qualified or could be quickly trained. In response to an inquiry from plaintiff's attorney, Mr. Weider stated that in giving his answer to the administrative law judge's hypothetical question he had considered plaintiff's inability to use public transportation. He pointed out that plaintiff could get a lift from an acquaintance, which is what plaintiff claims he did in the past (Tr. 56), use private transportation, or take a taxi (Tr. 63-68).

Based on his personal observations at the hearing, the administrative law judge described the claimant as a person who "presented the appearance of a well-developed and well-nourished individual in no distress". His gait was described as good and "he had no difficulty standing walking, sitting or rising". (Tr. 16).

Subsequent to plaintiff's filing his action in the district Court, but prior to June 16, 1975, the date of the district court's decision granting defendant's motion for judgment on the pleadings, plaintiff obtained a statement from Dr. J. I. Wessler, dated April 8, 1975. This note was submitted by plaintiff to the district court.[5] In it, Dr. Wessler states that plaintiff has recurrent, but apparently not continuous, tenderness, irritation and neuroma[6] at his amputation site.

Plaintiff also included as Exhibits B and C in the addendum to his brief two letters from the maker of his

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[5] See addendum to Plaintiff's Brief, Exhibit A.

[6] "When a nerve is cut, the fibers grow downward in nature's attempt at repair, and form a sort of snarled ball of nerve fibers when the other end of the nerve is not there for them to grow into. This is called a neuroma. The object at the time of amputation is to cut the nerve at a level where the neuroma will not be pressed upon by the prosthesis or by scar tissue. In spite of forethought and precautions, a painful neuroma sometimes occurs. It is best treated by removal". Gray, *op. cit. supra* note 1 at ¶ 2A.55(1).

prosthesis; these letters mention that plaintiff has problems with his present artificial limb due to improper fit. Exhibits B and C were never presented to the district court.

ARGUMENT

The District Court properly upheld the secretary's determination that, based upon substantial evidence, the plaintiff was not entitled to disability benefits.

In order to establish entitlement to a period of disability insurance benefits plaintiff has the burden of establishing that he was unable to engage in substantial gainful activity (1) by reason of a physical or mental impairment, which (2) can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least 12 months and (3) the existence of which is demonstrated by evidence supported by objective data obtained by medically acceptable clinical and laboratory techniques, at a time when he met the insured status requirements of the Act. Act § 223(d); *Reyes-Robles* v. *Finch*, 409 F.2d 84 (1st Cir. 1969); *Henley* v. *Celebrezze*, 394 F.2d 507 (3d Cir. 1969); *Franklin* v. *Secretary of HEW*, 393 F.2d 640 (2d Cir. 1968).

Plaintiff, however, has failed to meet his burden of showing that he ever had a disability as discussed above at any time, much less when he was insured under the Act. In reality plaintiff was and is capable of gainful employment, as manifested by the fact that he was actually gainfully employed while having the very impairment he now contends entitles him to disability benefits. There is ample evidence from the record and Plaintiff's Exhibits A, B and C that whatever difficulties plaintiff may experience as a result of his amputation are remediable and hence not disabling under the Act.

Section 205(g) of the Act provides that "the findings of the Secretary as to any facts, if supported by substantial evidence, shall be conclusive". Accordingly, the Secretary's findings, if reasonable, should not be disturbed by the court on review. *Richardson* v. *Perales*, 402 U.S. 389 (1971); *N.L.R.B.* v. *Walton Manufacturing Co.*, 369 U.S. 404 (1962). It has been held that the conclusive effect of the substantial evidence rule applies to the Secretary's findings not only as to basic evidentiary facts but also as to inferences and conclusions drawn therefrom. *Levine* v. *Gardner*, 360 F.2d 727 (2d Cir. 1966); *Rocker* v. *Celebrezze*, 358 F.2d 119 (2d Cir. 1966); *Palmer* v. *Celebrezze*, 334 F.2d 306 (3d Cir. 1964); *Celebrezze* v. *Bolas*, 316 F.2d 498 (8th Cir. 1963). Thus the court's review of the Secretary's determination is limited to whether the Secretary's findings as to relevant facts and the inferences drawn therefrom are supported by substantial evidence. *Franklin* v. *Secretary of HEW*, 393 F.2d 640, 642 (2d Cir. 1968); *Robinson* v. *Richardson*, 360 F. Supp. 243, 248 (E.D.N.Y. 1973); 42 U.S.C. § 105(g). If findings are supported by substantial evidence on the record as a whole, the court must sustain the Secretary's determination. *Gold* v. *Secretary of HEW*, 463 F.2d 38, 41 (2d Cir. 1972).

There is no question that plaintiff had his left leg amputated below the knee ten years ago when he was 15 years old. However, plaintiff has failed to produce any medical evidence sufficient to support his allegation that, due to this impairment, he was unable to engage in *substantial gainful employment* prior to June 30, 1973, when he last met the insured status requirements of the Act. In fact, an orthopedic surgeon who examined plaintiff in December of 1972 found that plaintiff was a well-developed young man who could walk four or five blocks, sit for unlimited periods of time and stand for one-half hour at a time. His stump showed no signs of tissue breakdown, and plaintiff admitted at his hearing that he

sought medical attention for his stump *only once* since the amputation.

It has been recognized by the courts that loss of a leg is not an impairment that renders one unable to engage in substantial gainful employment as that term is defined in the Social Security Act. *Freedom* v. *Cohen*, 294 F. Supp. 1391 (E.D. Ky. 1969); *Cortes* v. *Richardson*, 372 F. Supp. 485 (D.P.R. 1973); *Robinson* v. *Celebrezze*, 326 F.2d 840 (5th Cir. 1964), *cert. denied*, 379 U.S. 851 (1964) a leading case on the disabling effects of amputation of a limb under the Social Security Act, the Fifth Circuit observed:

> "The evidence here discloses that it is *common knowledge*, that a man with only one arm or leg, if not otherwise incapacitated, may do much valuable work and engage in many gainful occupations, and there are many cases so holding." (Emphasis added.)

It has, of course, been noted that plaintiff has complained of various kinds of discomfort with his leg and the complaints were fully considered by the Secretary in reaching his decision. But the inability of an individual to work without some pain or discomfort does not necessarily satisfy the test for disability under the Act. *Adams* v. *Fleming*, 276 F.2d 901 (2d Cir. 1960). Furthermore, the only evidence in the administrative record of disabling pain comes from plaintiff's own statements that are not supported by the medical evidence presented to the Secretary. The Secretary is not bound to accept as true such unsupported self-serving statements *Reyes-Robles* v. *Finch*, 409 F.2d 84 (1st Cir. 1969); *Labee* v. *Cohen*, 408 F.2d 998 (5th Cir. 1969); *Peterson* v. *Gardner*, 391 F. 208 (2d Cir. 1968); *LaBoy* v. *Richardson*, 355 F. Supp. 602 (D.P.R. 1972); *Mounts* v. *Finch*, 304 F. Supp. 910, 917 (S.D.W. Va. 1969); *Brady* v. *Gardner*, 294 F. Supp. 870 (W.D. Va. 1968). Indeed, as was suc-

cinctly set forth by the First Circuit in the *Reyes-Robles* case:

> ". . . if a claimant could, as a matter of law, overcome the effect of what would otherwise be substantial evidence of continued ability to work by his own testimony as to his condition, the Secretary would rarely if ever be justified in denying benefits." 409 F.2d 84, 87.

In addition to the medical evidence of record the Secretary also properly considered the testimony of a vocational expert, Mr. Weider, *Chavis* v. *Finch*, 443 F.2d 356 (9th Cir. 1971); *Ross* v. *Richardson*, 440 F.2d 690 (6th Cir. 1971); *Johnson* v. *Finch*, 437 F.2d 1321 (10th Cir. 1971). Mr. Weider testified at plaintiff's hearing on May 8, 1974, that it was his opinion, after giving due consideration to plaintiff's age, education, work experience, and physical condition, that plaintiff was capable of doing numerous types of work. In response to a question posed by plaintiff's attorney, Mr. Weider stated that any possible problems plaintiff might have using public transportation would not preclude him from working. A private vehicle, taxis, or lifts from friends, a mode of transportation used by plaintiff in the past, were all alternative means of transportation that in Mr. Weider's experience had been successfully employed by individuals unable to use public transportation.

Despite the substantial evidence in support of the Secretary's denial of disability benefits, plaintiff still alleges the Secretary's decision is defective. Plaintiff apparently contends that section 1.10(c)(3) of the Appendix to Subpart P, Title 20 of the Code of Federal Regulations entitles him to disability benefits. This section of the regulations deals with disability insurance claimants who *cannot* use a prosthesis effectively due to stump complications expected to persist for at least 12 months.

There is no medical evidence that has been produced that indicates that stump complications of a kind that would satisfy this provision, existed during the period plaintiff was insured under the Act, or even at the present time. In fact just the opposite is indicated by Dr. Samuels' report. Plaintiff's Exhibits B and C, the letters from the prosthesis manufacturer, suggest that whatever problems plaintiff might have can be corrected by the proper fitting of of a new prosthesis and thus cannot be a basis for granting the benefits sought. 20 C.F.R. § 404.1507.[7]

Plaintiff included in the addendum to his brief, a copy of Dr. Weissler's noted dated April 8th, 1975, indicating that as of that date plaintiff had certain problems with his leg. However, this is irrelevant information since plaintiff has not been insured under the Act since June 30, 1973. No medical evidence was ever produced by plaintiff or his attorney, either at the hearing or subsequent thereto, establishing that plaintiff had stump complications while he was insured under the Act.

Even if we assumed that plaintiff had the problems recited in Dr. Weissler's note when he was insured,

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[7] § 404.1507 Failure to follow prescribed treatment.

For purposes of entitlement to a period of disability or to disability insurance benefits or to child's, widow's or widower's insurance benefits based on disability, an individual's impairment must also be expected to result in death or to have lasted or be expected to last for a continuous period of not less than 12 months. An individual with a disabling impairment which is amenable to treatment that could be expected to restore his ability to work shall be deemed to be under a disability if he is undergoing therapy prescribed by his treatment sources but his impairment has nevertheless continued to be disabling or can be expected to be disabling for at least 12 months. However, an individual who willfully fails to follow such prescribed treatment cannot by virtue of such failure be found to be under a disability. Willful failure does not exist if there is justifiable cause for failure to follow such treatment.

these problems would not be a basis for disability benefits since they are remediable. Neuroma is a condition correctable by surgery. (See footnote 6). The other conditions recited in the note would be alleviated by a properly fitting prosthesis, as suggested by Plaintiff's Exhibits B and C.

Plaintiff also asserts in his brief that the Social Security Administration was somehow remiss in not developing evidence that plaintiff suffered from certain personality disorders. There is nothing in the administrative record or in the transcript of the hearing that would suggest that a psychiatric consultation should have been sought. Plaintiff's attorney at the hearing never requested that the administrative law judge develop evidence concerning plaintiff's mental state and there was nothing presented to the administrative law judge that would have warranted his doing it sua sponte. (See 20 C.F.R. § 404.927).

Plaintiff also charges that the administrative law judge was biased and conducted an unfair hearing by not affording plaintiff's counsel an opportunity to fully express his objection to the admissibility of a certain exhibit, by not fully developing the extent and debilitating effects of plaintiff's pain and by not affording counsel an opportunity to give a summation. Clearly, the transcript of the hearing does not support these contentions.

Plaintiff's counsel did express his objection and he was overruled (Tr. 42).[8] The administrative law judge

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[8] It should be noted that 42 U.S.C. 405(b) provides "Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure." See also *Richardson* v. *Perales, supra,* and 20 C.F.R. § 404.927, which provides:

[Footnote continued on following page]

did inquire as to plaintiff's pain (Tr. 53, 54, 58) and provided plaintiff's counsel an unbridled opportunity to bring out or amplify any aspect of plaintiff's claim that counsel felt was not fully or properly developed during the administrative law judge's examination of plaintiff (Tr. 45ff). Plaintiff's counsel did make a statement for the record at the invitation of the administrative law judge subsequent to plaintiff's testimony (Tr. 59-60). At the close of the hearing, plaintiff's counsel also made a brief statement again at the invitation of the administrative law judge. The administrative law judge then stated "If there is nothing *further* you wish to state for the record this hearing will be closed" to which comment plaintiff's counsel remained mute (Tr. 68).

In sum, the record reveals no substance to plaintiff's contention that he was not accorded a full and fair hearing or that the Secretary's decision was not based on substantial evidence.

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§ 404.927 Conduct of hearing.

Hearings shall be open to the parties and to such other persons as the Administrative Law Judge deems necessary and proper. The Administrative Law Judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. If the Administrative Law Judge believes that there is relevant and material evidence available which has not been presented at the hearing, the Administrative Law Judge may adjourn the hearing or, at any time prior to the mailing of notice of the decision, reopen the hearing for the receipt of such evidence. The order in which evidence and allegations shall be presented and the procedure at the hearing generally, except as these regulations otherwise expressly provide, shall be in the discretion of the Administrative Law Judge and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

CONCLUSION

The Judgment of the District Court should be affirmed.

Dated: March 2, 1976

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 5th day of March, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Marc L. Ames, Esq.
11 Park Place
New York, N.Y. 10007

Evelyn Cohen

Sworn to before me this
5th day of March, 1976

Juanita Mayo

JUANITA MAYO
Notary Public, State of New York
No. 24-4501911
Qualified in Kings County
Commission Expires March 30, 1977